

**National Security (Legislative Provisions) Bill :
Incitement as an element of sedition**

This paper explains –

- (1) whether the enactment of section 9A(1)(a) of the Crimes Ordinance would make any difference to the position that would exist at common law in the absence of that section;
- (2) whether the common law principles relating to incitement would apply to the proposed section 9A(1)(b) of the Crimes Ordinance, and to sections 6 and 7 of the Crimes Ordinance;
- (3) whether an offence would be committed under section 9A(1)(b) of the Crimes Ordinance if a person in Hong Kong sends an e-mail or letter to a person outside Hong Kong, inciting relevant conduct;
- (4) whether a person can be convicted of inchoate offences relating to incitement;
- (5) whether there are precedents for the proposed section 9B of the Crimes Ordinance; and
- (6) how frequently charges of incitement are brought.

(1) Section 9A(1)(a)

2. Under the proposed section 9A(1)(a) of the Crimes Ordinance a person commits sedition if he incites others to commit treason, subversion or secession.
3. This provision reflects a general principle of the criminal law that it is an offence to incite the commission of any offence. There does not seem to be any reason why the common law principles relating to incitement should not apply to this statutory offence of incitement.

Penalty

4. In the absence of section 9A(1)(a), the maximum penalty for inciting treason, subversion or secession would be the same as the maximum penalty for those offences i.e. life imprisonment (see s.101CI(2) of Cap 221). Since section 9A(1)(a) provides a similar maximum penalty, the enactment of that offence would not change that position.

References to sedition

5. The

- (1) investigation power under the proposed section 18B of the Crimes Ordinance;
 - (2) requirement of the Secretary for Justice's consent to prosecute (proposed section 18C); and
 - (3) requirement of trial by jury (proposed section 18D),
- all apply to the offence of sedition under section 9A(1)(A).

6. If incitement to commit treason, subversion or secession were to be left as common law offences, and were not parts of the offence of sedition, the investigation provision, the SJ's consent provision and the requirement for trial by jury referred to above would not apply to those common law offences. However, each of those provisions also apply to treason, subversion and secession. Under section 101C of Cap 221, a reference made in any Ordinance to an offence includes a reference to an incitement to commit that offence. Those provisions would therefore apply to incitement to commit treason, subversion or secession, even if such incitement did not amount to sedition.

Purpose of section 9A(1)(a)

- 7. The above analysis demonstrates that the enactment of section 9A(1)(a) would merely reflect the common law position. The criminal law would not therefore be extended by its enactment. Moreover, it is not uncommon for common law principles to be set out expressly in legislation. On the contrary, the codification of common law principles is generally thought to be beneficial, since it makes the law more accessible.
- 8. More importantly, Article 23 requires the HKSAR to enact laws on its own to prohibit (amongst others) sedition. The Administration considers that the incitement of treason, subversion or secession is a serious form of sedition. It is therefore appropriate to prohibit this form of sedition by an express provision.

(2) Sections 9A(1)(b), 6 and 7

9. Under the proposed section 9A(1)(b) of the Crimes Ordinance a person commits sedition if he incites others to engage, in Hong Kong or elsewhere, in violent public disorder that would seriously endanger the stability of the People's Republic of China.
10. Engagement in violent public disorder is not in itself necessarily an offence under Hong Kong law, particularly if it takes place outside Hong Kong. The incitement of such conduct is not therefore the same as the incitement of an offence, and would not be an offence at common law. It is nevertheless considered that such incitement should be prohibited as being a form of sedition.
11. It is considered that the common law principles relating to incitement would apply to this offence.
12. Section 6 of the Crimes Ordinance makes it an offence to incite a member of [Her Majesty's] forces to commit an act of mutiny or any traitorous or mutinous act, or to make or endeavour to make a mutinous assembly. Again, it is considered that common law principles relating to incitement would apply to this offence.
13. Section 7 of the Crimes Ordinance is headed "Incitement to disaffection". However, the section does not use the word "incite". There is therefore no reason why common law principles relating to incitement should apply to that offence.

(3) Communications sent outside Hong Kong

14. Under the proposed section 9A(1)(b), the incitement itself (as opposed to the conduct incited) must take place in Hong Kong. The question therefore arises as to whether an offence is committed if a person in Hong Kong sends an e-mail, letter or other form of communication to a person who is outside Hong Kong to incite the relevant conduct.
15. It is considered that an offence would be committed in such circumstances. In *R v Owen and Another* [1956] 3 All ER 432, the English Court of Appeal held that a person who, in England, posted a forged document to an address in Germany was correctly convicted of uttering the forged document in England. Since incitement requires actual communication, it is likely that the substantive offence would only be committed when the message reached the recipient.

(4) Inchoate offences relating to incitement

16. Under the general law, it is an offence –
 - (1) to attempt to incite the commission of an offence;
 - (2) to incite a person to incite the commission of an offence;
 - (3) to conspire to incite the commission of an offence.
17. Under the Bill, a person could **not** be convicted of inciting one person to incite others to commit treason, subversion or secession (see proposed section 9B of the Crimes Ordinance). The enactment of section 9A and 9B would therefore limit the extent to which activities relating to treason, subversion or secession are criminal.
18. It should also be noted that the effect of the proposed section 9B will be that a person could **not** be convicted of attempting or conspiring to incite one person to incite others to commit treason, subversion or secession.
19. A person **could** be convicted of attempting, or conspiring, to commit an offence under section 9A. In the case of an offence under section 9A(1)(a) (inciting treason, subversion or secession), this would merely reflect the position under the general law. In the case of an offence under section 9A(1)(b) (incitement to engage in violent public disorder etc), this would reflect the general principle that it is an offence to attempt or conspire to commit any other offence.
20. Under the general rule, it seems that –
 - (1) it is **not** an offence to incite a person to be an accomplice to an offence;
 - (2) it is an offence to incite a person to commit an inchoate offence.

There is no reason to believe the position would be different under the proposed section 9A(1).

(5) Section 9B of Crimes Ordinance

21. The proposed section 9B of the Crimes Ordinance provides that inciting others to commit an offence under section 9A (sedition) is not an offence.

22. The Administration has been asked to find out whether there is any provision in the Laws of Hong Kong providing that inciting others to commit a substantive offence is not an offence. Our research reveals that there is no such provision.
23. Nevertheless, it is considered that the proposed section 9B is appropriate. The proposed section 9A is itself an incitement offence. If the proposed section 9B is not enacted, A could be liable at common law for inciting B to incite C to commit treason, subversion or secession, even if A's incitement was not successful. This is considered to be too remote for criminal liability to be attached in this context.

(6) Incitement charges

24. It appears that charges of incitement are not common. On average, probably not more than five charges are brought each year. The likely reasons for this low figure are –
 - (1) if the incitement does not result in the commission of the offence incited, there may be no criminal investigation that might uncover the incitement;
 - (2) if the incitement does result in the commission of the offence –
 - (a) where the incitement is discovered, the incitor might sometimes be charged as a principal or co-conspirator, rather than as an incitor;
 - (b) the investigation and prosecution may concentrate only on the principal offenders.

Department of Justice
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